

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BERNARD D. LONG,)	4:09CV3046
)	
Petitioner,)	
)	
v.)	MEMORANDUM
)	AND ORDER
ROBERT P. HOUSTON, Dir.)	
N.D.C.S., and STATE OF)	
NEBRASKA,)	
)	
Respondents.)	

This matter is before the court on Petitioner's Motion for Leave to Appeal In Forma Pauperis (filing no. [20](#)), Motion to Appoint Counsel (filing no. [23](#)), and Motion to Appeal, which the court liberally construes as a Motion for Certificate of Appealability (filing no. [24](#)).

Petitioner filed his Petition for Writ of Habeas Corpus on March 5, 2009, asserting claims relating to his convictions for first degree murder and use of a weapon to commit a felony. (Filing No. [1](#).) On October 21, 2009, the court dismissed Petitioner's claims and entered judgment in favor of Respondents. (Filing Nos. [15](#) and [16](#).) After the denial of his Motion for Reconsideration (filing no. [18](#)), Petitioner filed a timely Notice of Appeal (filing no. [19](#)).

I. Motion for Leave to Appeal in Forma Pauperis

Petitioner is a prisoner who was previously granted leave to proceed IFP. (Filing No. [5](#).) Federal Rule of Appellate Procedure 24(a)(3) states:

- (a) Leave to Proceed in Forma Pauperis

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court – before or after the notice of appeal is filed – certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding[.]

Id. The court finds that, because Petitioner was previously given leave to proceed IFP, he may now “proceed on appeal in forma pauperis without further authorization” in accordance with [Federal Rule of Appellate Procedure 24](#).

II. Motion to Appeal/Motion for Certificate of Appealability

Before a petitioner may appeal the dismissal of a petition for writ of habeas corpus, a “Certificate of Appealability” must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by

paragraph(2).¹

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. *See 28 U.S.C. § 2253(c)(2)*. Such a showing requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted), citing *Barefoot v. Estelle*, 463 U.S. 894 (1983) (defining pre-AEDPA standard for a certificate of probable cause to appeal).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484. Similarly, if the district court denies a petition for writ of habeas corpus on procedural grounds without reaching the underlying constitutional claims on the merits:

[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and ... would find it debatable whether the district court was correct in its procedural ruling Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

¹Similarly, *Federal Rule of Appellate Procedure 22(b)*, as amended by AEDPA, indicates that in an action pursuant to *28 U.S.C. § 2254*, a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. *See generally Tiedeman v. Benson*, 122 F.3d 518, 521 (8th Cir. 1997).

Id.

The court has carefully reviewed the record and Petitioner's Motion to Appeal and Brief in Support of Motion to Appeal. (Filing Nos. [24](#) and [25](#).) Petitioner has failed to demonstrate that reasonable jurists would find this court's ruling debatable or wrong. For the reasons stated in its October 21, 2009, Memorandum and Order (filing no. [15](#)), which dismissed Petitioner's claims because they were either not cognizable in a federal habeas corpus proceeding or because they were procedurally defaulted, the court declines to issue a Certificate of Appealability.

III. Motion to Appoint Counsel

Petitioner also seeks the appointment of counsel, presumably for purposes of his appeal. (Filing No. [23](#).) As the court previously informed Petitioner, “[t]here is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court.” [*McCall v. Benson, 114 F.3d 754, 756 \(8th Cir. 1997\)*](#). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner's ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. *See, e.g., Morris v. Dormire, 217 F.3d 556, 558-59 (8th Cir. 2000), cert. denied, 531 U.S. 984 (2000); Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir. 1994)* (citations omitted). *See also* Rule 8(c) of the [*Rules Governing Section 2254 Cases in the United States District Courts*](#) (requiring appointment of counsel if an evidentiary hearing is warranted.) In light of these standards, the court finds that there is no need for appointment of counsel at this time.

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Leave to Appeal in Forma Pauperis (filing no. [20](#)) is granted.

2. Petitioner's Motion to Appeal, construed as a Motion for Certificate of Appealability (filing no. [24](#)), and Motion to Appoint Counsel (filing no. [23](#)) are denied without prejudice to reassertion before the Eighth Circuit.

3. The Clerk of the court shall provide the Court of Appeals a copy of this Memorandum and Order.

DATED this 18th day of February, 2010.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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